CAPITALCORP SECURITIES SDN BHD A

v.

SHAMSIWALIS ISMAIL

HIGH COURT MALAYA, KUALA LUMPUR B
MARY LIM JC
[SUIT NO: D1-22-1965-1998]
27 JULY 2009

CONTRACT: *Shares, sale of - Fraud - Trading activities in defendant's account - Whether transactions authorized or instructed by defendant* C

The defendant allegedly opened a trading account with the plaintiff – a share broking firm. There was supposedly trading of shares and securities in the account assigned to the defendant by the plaintiff. The defendant subsequently failed or refused to settle the amount D due from the securities traded, prompting the plaintiff to file the instant action. The defendant admitted to signing in blank an application form to open an account with the plaintiff. However, she denied giving instructions to trade or receiving any contract notes and monthly statements sent by the plaintiff in respect of the E shares traded. She *inter alia* pleaded in the defence that the address to which the contract notes and monthly statements were sent was incorrect. She further pleaded that any trading in the alleged account must have been made by reason of fraud or cheating committed by the plaintiff's employees or agents for which the she F could not be held responsible or liable.

Held (dismissing the plaintiff's action with costs):

(1) From the evidence, a personal account had indeed been opened and for a while the defendant did trade in the account. G (para 9)

(2) All correspondence sent to the defendant to an address other than that which appeared on her application form was bad. In the absence of any evidence that the defendant had changed her address the plaintiff was obliged to send all documents to H the address as stated in the application form. Only then could it be said that the documents had been properly sent and the defendant had been afforded an opportunity to scrutinize and refute any discrepancies but she failed to avail herself of those opportunities. Sending the documents to an address different I from that in the contract was a breach of obligations on the part of the plaintiff. (paras 14 & 16)

(3) The defendant's evidence was credible as the time lapse between the making of the police reports and the time she discovered the plaintiff's action revealed promptitude and reasonable conduct suggesting absence of blame. (para 17)

(4) The evidence from the plaintiff's own witnesses revealed that the transactions were not instructed by the defendant. (para 19)

For the plaintiff - Jefri Jaafar; M/s Jefri Jaafar & Partners
For the defendant - Mohd Yaacob Bakanali (Azmer Md Saad with him); M/s Lainah Yaacob & Zulkepli

Reported by Andrew Christopher Simon

JUDGMENT

Mary Lim JC:

[1] This is a claim essentially founded on a contract which the Defendant disputes its very existence.

The Plaintiff's Claim

[2] The plaintiff is a share broking firm. It accepts both corporate and individual accounts as its clients. The defendant is said to have opened a personal or individual account with the plaintiff. There was supposedly trading of shares and securities in the account assigned to the defendant by the plaintiff. The defendant subsequently failed or refused to settle the total sum of RM346,982.99 comprising the principal sum of RM279,366.42 as at 20 January 1999 together with interest of RM42,884.18 calculated at 14% per annum as monies due from the securities traded. This sum specifically arises from the trading of shares of MAICA, SANDA, BC-BHD and SAAG between October 1996 and January 1997.

The Defence

[3] The defendant admitted to signing in blank an application form to open an account with the plaintiff. But because there was no feedback she assumed the account had not been approved. She denied giving instructions to trade or receiving any contract notes and monthly statements sent by the plaintiff in respect of the shares traded. It was *inter alia* pleaded in the defence that the address to which the contract notes and monthly statements were sent was incorrect. It was further pleaded that any trading in the alleged account must have been made by reason of fraud or cheating

committed by the plaintiff's employees or agents for which the defendant cannot be held responsible or liable. She made two police reports on this.

Issue

[4] The issue for determination is whether the defendant owes the plaintiff the sum claimed.

Findings

[5] The relationship between the plaintiff and the defendant is contract based. In order to succeed in its claim, the plaintiff has to prove the existence and the terms of the contract. The plaintiff further has to prove that the contract and more particularly the account, was operated according to the defendant's instructions.

[6] The plaintiff called three witnesses, two of whom were employed by the plaintiff at the material time, namely Ahmad Zahari bin Abu Kassim (PW1), Mohamad Zahar bin Mohamad Sharif (PW2) and Malakit Singh s/o Naginder Singh (PW3) from the Malaysian Central Depository Sdn Bhd (MCD). PW1 was employed by the plaintiff and he acted as the dealer representative of the defendant's account which had been assigned a code of DAB 549.

[7] According to PW1, this account was managed by a team of about five individuals. His job was to key-in all instructions of trade, both buying and selling as conveyed by the Business Development Department. Those oral instructions were recorded in Business Done Slips which unfortunately were never kept. He never met, spoke to or receive any instructions directly from the defendant. The data that had been keyed-in would be reproduced in the form of contract notes and monthly statements sent regularly to the client or defendant in this case.

[8] The defendant gave evidence and called the police officer with whom she liaised on the outcome of the two police reports made.

[9] First the contract. The plaintiff offered in evidence allegedly a copy of the personal account application form which bears the defendant's personal particulars. Unfortunately this document is incomplete as only one side of the form was tendered. The defendant objected strenuously to the tendering of the other side and the matter was not pursued by the plaintiff. In this regard the

defendant claims to have signed the form in blank and signed the form at a friend's house. The plaintiff argued that signing in blank is not a feasible defence. The defendant is still bound. I agree. It does not matter where and the circumstances of the opening of that account so long as the plaintiff can prove the existence of the account. At about the same time a second application form dated 27 June 1996 appears to have been fully completed. This was for the opening of an individual/corporate account with the Malaysian Central Depository Sdn Bhd (MCD), a requisite step if the trade involves scriptless shares. This form is not in dispute. Hence the form signed in blank must have been this application form of which only one of its two sides was tendered. I am therefore inclined to hold that a personal account has indeed been opened and for a while the defendant had traded in the account. This is supported by the evidence of payments in the monthly statements of June to August 1996 (exh. P7).

[10] The second matter concerns the address of the defendant. This was the focus of much attention at the trial. The plaintiff led evidence on the general practice in trade transactions. After each transaction, contract notes of the specific shares or securities transacted are sent to the client. These contract notes are evidence of the transactions carried out upon the instructions of the account holder in this case, the defendant. Any errors on these contract notes are supposed to be notified within 24 hours of receipt of the contract notes. Thereafter, monthly statements of all the transactions will be sent. Once again, discrepancies are supposed to be referred within 14 days from the date of the statement. Otherwise the statements are deemed to be correct and in order. MCD will similarly send monthly statements which in a sense mirror the monthly statements issued by the plaintiff.

[11] Now, the matter of the address is like this. The address stated in the personal account application form reads as "74-4 Jalan Gombak, 53000 Kuala Lumpur" whereas the address on the MCD application form reads as "74-4 Batu 3 3/4 Jalan Gombak, 53000 Kuala Lumpur". The difference being "Batu 3 3/4" is not specified. However, the relevant contract notes and the monthly statements from September 1996 to March 1999 were all sent to "No. 11, Jalan Kenanga, Bandar Sri Damansara, 52200 Kuala Lumpur". The issue is whether the defendant received these several documents. If she did, she was obliged to protest within the time frames stipulated. Failing which she was bound.

[12] The defendant denied receiving the documents. For a start, she does not reside at the address at Bandar Sri Damansara. Furthermore, the address in Jalan Gombak is incomplete. The address on her identification card and the affidavit filed by the plaintiff's own process server in support of its application for substituted service of this writ of summons confirm this. It was the submission of the defendant that the circumstances clearly proved the defendant's assertion.

[13] The plaintiff took the position that the defendant's contention was not at all plausible and set about proving so rather circuitously. The defendant had admitted to opening an account with another broking firm called KN Kenanga. For this other account, an MCD account was also opened. The defendant admitted she received all statements from MCD in relation to this other account. Since the defendant's address on the MCD form was not in dispute, the plaintiff submitted an inference can be drawn – that the defendant must have received the MCD statements in respect of the defendant's account with the plaintiff. To have received MCD statements for the KN Kenanga account but not for the plaintiff's was perceived as "selective amnesia" requiring scrutinizing the defendant's evidence with care.

[14] Having heard and carefully considered the evidence, I am of the view that the defendant must have received the documents. But only so long as these documents were sent to the address at Jalan Gombak. This can be inferred from the monthly statements for June to August 1996 where there appears to be some trading and settling of the account by the defendant. However, the mailing address was changed to the one at Bandar Sri Damansara. Although the plaintiff's witnesses confirmed that a client may change the address neither PW1 nor PW2 could confirm if there was in fact any change in the case of the defendant. No documentary proof was offered either of any change of address carried out at the request of the defendant. That being so I accept that all correspondence with an address other than that which appears on the application form is bad.

[15] Insofar as the MCD account is concerned, there is no evidence tendered as to which address was in fact used by MCD to send the statements. PW3 testified that MCD must have sent its statements to the defendant's address in the ordinary course of business. However, details pertaining to the defendant's account with MCD were not produced because MCD did not keep records beyond seven years as provided under the Securities Industry

(Central Depository) Act 1991. Nevertheless, due to a lack of explanation as to why the plaintiff's own documents were mailed to an address different from that appearing in the application form, I am not prepared to draw the inference proposed by the plaintiff. In fact, in preparation of this action filed in 1998 the plaintiff ought to have diligently gathered its evidence including securing copies of documentary evidence in the possession of third parties such as MCD. Instead the plaintiff left it to the date of trial by which time the MCD records were no longer available. In as much as the MCD statements could have been sent to the address as appearing in the application form, the statements may well have been sent to the address at Bandar Sri Damansara too thus accounting for the defendant's lack of protest.

[16] There is a fundamental point which appears to have been overlooked. Before the plaintiff may succeed in its claim it must be shown that it had itself complied with all the obligations under the contract. In the absence of any evidence that the defendant had changed her address I would say the plaintiff must send all documents to the address as stated in the application form. Then and only then can it be said that the documents had been properly sent and the defendant had been afforded an opportunity to scrutinize and refute any discrepancies but she failed to avail herself of those opportunities. Sending it to an address different from that in the contract is a breach of obligations on the part of the plaintiff. It would be highly inappropriate to now use inferential evidence through the workings of MCD.

[17] In the defendant's evidence she has testified that as soon as she knew about the plaintiff's claim (when bankruptcy proceedings were initiated but subsequently withdrawn) she made two police reports. Her reports are in summary consistent with her assertion that she is a victim of fraud and cheating. I find her evidence credible as the time lapse between the making of the police reports and the bankruptcy proceedings revealed promptitude and reasonable conduct suggesting absence of blame.

[18] A final matter that needs to be addressed concerns the trade in the defendant's account for which the debt is claimed. From the testimonies of PW1 and PW2 there is already doubt as to whether the transactions upon which the debt arises were carried out on the instructions of the defendant. This industry of trading in shares and securities operates to a large extent on trust where oral instructions, frequently sight unseen are given and readily acted upon. In most

cases, this does not present problems. But in some such as the instant case, this is disputed and that is where the problem lies. Who is to be believed? In circumstances such as that presented, the court relies on neutral evidence.

[19] PW1 testified that he was the dealer representative authorized to key-in transactions made. He testified that he did not know the defendant and had never met nor spoken with her. The data of transactions that he keyed-in were supposedly upon the instructions of one Mohamad Kamar Abdullah. The existence of this Mohamad Kamar Abdullah is confirmed by PW2. Yet, Mohamad Kamar Abdullah was never called to testify. No explanation was offered for such failure. I find the testimony of PW2 quite illuminating. PW2 testified that account DAB 549 was assigned to PW1 and PW1 was the "only person who can secure instructions from client ..." This evidence from PW2 is neutral in that he is a witness of fact based on the records and his understanding of the operative procedures within the plaintiff. He was not involved in the account of the defendant at the material time. According to PW2, PW1 was the only person who could have dealt with the defendant. Yet, PW1 claimed he never secured any instructions from the defendant. The upshot of all this can only mean one thing and this is from the plaintiff's own witnesses' testimonies – the transactions were not instructed by the defendant. It does not matter who else did. It was not the defendant.

[20] I find the claim of the plaintiff not proved. The claim therefore fails and must be dismissed with costs.